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CHARLES ELMORE CR

Nos. 421 and 422

In the Supreme Court of the United States

OCTOBER TERM, 1951

DEAN ACHESON, AS SECRETARY OF STATE, APPELLANT

v.

KIMURA OKIMURA

DEAN ACHESON, AS SECRETARY OF STATE, APPELLANT

v.

HISAO MURATA

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

MEMORANDUM FOR APPELLANT IN OPPOSITION TO APPELLEES' MOTIONS TO DISMISS OR AFFIRM

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As we pointed out in our Statement as to Jurisdiction in No. 421, the court below held categori-

cally that Congress has no power to divest a native born American citizen of his nationality except where he voluntarily acquires foreign nationality by naturalization. Appellees apparently would not go that far; they argue in their motions to dismiss or affirm that expatriation can constitutionally be imposed only with the consent of the citizen. We have answered both of these propositions in our jurisdictional statement. We there pointed out that in *Mackenzie* v. *Hare*, 239 U.S. 299, this Court rejected a contention identical with that made by appellees here and held that the voluntary performance of an act which Congress has declared shall result in the loss of American citizenship does not amount to expatriation without the concurrence of the citizen, but is "a condition voluntarily entered into, with notice of the consequences" (239 U.S. at 312). This Court has made it equally clear, both in the *Mackenzie* case and in *Savorgnan* v. *United States*, 338 U.S. 491, 497-502, that an intent not to give up native American citizenship does not relieve the citizen from the consequence of expatriation flowing from his voluntary performance of an objective act of expatriation specified by Congress. In view of these decisions and the others cited in our jurisdictional statement, there is no room for argument that expatriation requires the subjective consent of the citizen.

Appellees' reliance upon certain language in the opinion of the First Circuit in *Dos Reis ex rel.*

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Camara v. *Nicolls*, 161 F. 2d 860, is misplaced. That court's doubts as to the validity of a literal application of Section 401(c) of the Nationality Act of 1940 (8 U.S.C. 801(c)) to Camara stemmed from the fact, as found by the District Court, that "His service as a draftee in the Portuguese army, with a concentration camp as the alternative, was under duress." (161 F. 2d at 862.)[1] The court held, however, that the constitutional question engendered by this finding was avoided by its interpretation of Section 401(c), based upon an exhaustive review of the legislative history, as being applicable only to voluntary service in the armed forces of a foreign state. The court did not question its validity as so construed.[2]

Appellees argue, however, that the judgments below can be sustained on the "non-constitutional" ground that their acts of expatriation were involuntary and therefore did not result in loss of their American citizenship.

We agree that if these acts were in fact and in law involuntary, appellees did not lose their citi-

[1] Appellees omit this sentence, and others, from their quotation from the opinion, thus creating the impression that the court's reference to "the circumstances here presented" related only to Camara's native birth. The portion omitted by appellees makes it clear that the court was referring to the circumstances of Camara's dual nationality and his involuntary impressment into the Portuguese army.

[2] Appellees' statement that *Dos Reis* v. *Nicolls*, *supra*, was "accepted" in *Savorgnan* v. *United States*, *supra*, is misleading. The *Dos Reis* case was cited in *Savorgnan* only as a dissimilar case involving "real duress" (338 U.S. at 502, fn. 18).

zenship. But no such conclusion is before the Court on these appeals. The District Court's findings referred to by appellees are findings of fact relating to certain circumstances to which appellees were exposed before they committed the acts in question. It might be that the trial court on the basis of these facts would conclude that the resulting acts of appellees were involuntary. But the court below made no such finding. It based its entire decision on the one conclusion of law it made, i.e., that 8 U.S.C. 801(c) and (e) are unconstitutional.

Indeed, there is language in the District Court's opinion in No. 421, which it adopted in No. 422, which, if not in and of itself sufficient to amount to a finding that appellees acted voluntarily, is at least inconsistent with a conclusion that their acts were involuntary. In discussing the sole issue it considered involved in the case, the court said:

> Our concern is, rather, where in the Constitution is to be found any grant of power—specific or reasonably implied—by which Congress is authorized to divest an American born citizen of his nationality because, having also Japanese nationality, *he served in the Japanese Army or voted in an election in Japan?* [Italics supplied.]

It is clear from this language that the court was assuming voluntary service in the Japanese Army and voluntary voting in a Japanese election.

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But even more inconsistent with a conclusion that appellees' acts were involuntary is the following language of the court in the closing passages of the opinion:

> Stricter enforcement of the law of treason may well be the solution to the *problem of dual citizens such as this, who selfishly play one country against another.* [Italics supplied.]

If the court had found that appellees had been coerced into committing the acts here involved, it would be strange indeed for it to charge them with selfishly playing one country against another. In any event, such language would indicate that the court did not conclude that their actions were involuntary.

In these circumstances, we submit that it is inappropriate to ask this Court to affirm the judgments of the District Court on the ground that appellees' acts were involuntary. True, the District Court made what might be considered subsidiary findings as to voluntariness. It did not, however, make the ultimate finding on that question. It cannot be said, therefore, that the District Court's judgments are sustainable on the ground advanced by appellees. Rule 52(a) of the Federal Rules of Civil Procedure requires the District Court to make findings of fact and conclusions of law. It has been the settled practice of this Court that when a lower court fails in this duty, this Court will not search the record to find a basis for

the lower court's order, but will remand the cause for appropriate findings. *Ford Motor Co.* v. *N.L.R.B.*, 305 U.S. 364, 373; *Borden's Farm Products Co.* v. *Baldwin*, 293 U.S. 194, 213; Robertson and Kirkham, *Jurisdiction of the Supreme Court of the United States* (Wolfson and Kurland ed.) § 197.

Since the sole ground of the decision below is clearly erroneous, we reiterate our suggestion that the judgments be reversed without further argument. In view of appellees' contention, consistently with the allegations of their complaints, that their acts were involuntary, we further suggest that it would be appropriate to remand the cases for further proceedings and decision on that issue.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

DECEMBER 1951.

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